1981

City of South Salt Lake v. Debbie L. Hanna : Brief for Respondent

Utah Supreme Court

W. Andrew McCullough; Attorney for Defendant-Appellant;
Clinton Balmforth; Attorney for Plaintiff-Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

CITY OF SOUTH SALT LAKE, a Municipal Corporation,	:	
Plaintiff-Respondent,	:	
v.	:	Case No. 17081
DEBBIE L. HANNA,	:	
Defendant-Appellant.	:	

BRIEF FOR RESPONDENT

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN
THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY
HONORABLE CHRISTINE M. DURHAM

W. ANDREW McCULLOUGH
Attorney for Defendant-
Appellant
930 South State Street
Suite 10
Orem, Utah 84057

CLINTON BALMFORTH
South Salt Lake City Attorney
Attorney for Plaintiff-Respondent
2500 South State Street
Salt Lake City, Utah 84115

TABLE OF CONTENTS

		Page
NATURE OF CASE		1
DISPOSITION IN THE LOWER COURT		1
RELIEF SOUGHT ON APPEAL		1
STATEMENT OF FACTS		2
ARGUMENT		
POINT I.	SECTION 3B-8-5(3) OF THE SOUTH SALT LAKE CITY REVISED ORDINANCES IS A VALID EXERCISE OF POLICE POWER.	2
A.	SOURCES OF POLICE POWER	2
B.	THE GENERAL WELFARE CLAUSE SHOULD BE BROADLY CONSTRUED TO ACCORD MUNICIPALITIES WIDE DISCRETION IN EXERCISING POLICE POWER	4
C.	THE HUTCHINSON DECISION SET UP A REASONABLENESS AND APPROPRIATENESS STANDARD	9
D.	STATE LAW HAS NOT PREEMPTED THE FIELD OF SEXUAL OFFENSES	15
E.	SECTION 3B-8-5(3) DOES NOT VIOLATE ARTICLE I, § 24 OF THE UTAH CONSTITUTION	20
POINT II.	SECTION 3B-8-5(3) DOES NOT DENY EQUAL PROTECTION OF THE LAW TO MASSAGISTS BECAUSE IT IS REASONABLY RELATED TO THE LEGITIMATE OBJECTIVE OF SUPPRESSING THE USE OF MASSAGE PARLORS FOR IMMORAL PURPOSES	21
POINT III.	SECTION 3B-8-5(3) IS SPECIFIC AND SUSCEPTIBLE TO LOGICAL AND RATIONAL INTERPRETATION AND THEREFORE IS NOT VAGUE	25
CONCLUSION		29

TABLE OF AUTHORITIES

CASES	Page
Allgood v. Larsen, 545 P.2d 530 (Utah 1976)	19
American Fork City v. Robinson, 77 Utah 168, 292 P. 249 (1930)	4
Call v. City of West Jordan, 606 P.2d 217 (Utah 1979)	13, 14
Ex parte Maki, 56 Cal. App. 635, 133 P.2d 64 (1943)	25
Greaves v. State, 528 P.2d 805 (Utah 1974)	27
Hollingsworth v. City of South Salt Lake, ___ P.2d ___ (No. 16831 Filed January 19, 1981) . .	18, 28
Layton City v. Glines, 616 P.2d 588 (Utah 1980) . .	5, 13
Layton City v. Speth, 578 P.2d 828 (Utah 1978) . . .	4, 19
Patterson v. City of Dallas, 355 S.W.2d 838 (Tex. Civ. App. 1962), appeal dismissed for want of a substantial federal question, 372 U.S. 251, 83 S.Ct. 873, 9 L.Ed.2d 732 (1963)	22
Peck v. Dunn, 574 P.2d 367 (Utah 1978)	13, 26, 27
Redwood Gym v. Salt Lake County Commission, ___ P.2d ___ (No. 16833 Filed January 19, 1981) . .	8, 18, 23
Rupp v. Grantsville City, 610 P.2d 33 (Utah 1980) .	5, 14
Salt Lake City v. Allred, 20 Utah 2d 298, 437 P.2d 434 (1968)	5, 9, 11, 12, 16, 17 18, 19, 20
Salt Lake City v. Doran, 42 Utah 401, 131 P. 636 (1913)	5
Salt Lake City v. Howe, 37 Utah 170, 106 P. 705 (1910)	5, 11
Salt Lake City v. Kusse, 97 Utah 113, 93 P.2d 671 (1938)	12, 13, 15 19, 20

Salt Lake City v. Savage, 541 P.2d 1035 (Utah 1975), cert. denied, 425 U.S. 915, 96 S. Ct. 1514, 47 L.Ed.2d 766 (1975) 25

Salt Lake City v. Sutter, 61 Utah 533, 2165 P. 234 (1930) 4

Smith v. Keator, 285 N.C. 530, 206 S.E.2d 203 (1974), appeal dismissed for want of a substantial federal question, 419 U.S. 1043, 95 S. Ct. 613, 42 L.Ed.2d 636 (1974) 24, 25

State v. Hutchinson, ___ P.2d ___ (Utah 1980) No. 16087 . . . . . 5, 6, 7, 9 11, 13, 14 17, 20

State v. Mason, 94 Utah 501, 78 P.2d 920 (1938) . . 21

State v. Packard, 122 Utah 369, 250 P.2d 561 (1952) 26

Utah Transit Co. v. Ogden City, 89 Utah 546, 58 P.2d 1 (1936) 4

STATUTES

U.S. Const. amend. 14 . . . . . 25, 29

Utah Const. art. I, § 4 21

Utah Const. art. XI, § 5 20

Utah Code Ann. § 10-8-41 3

Utah Code Ann. § 10-8-51 3

Utah Code Ann. § 10-8-84 . . . . . 2, 4, 5, 10, 13

Utah Code Ann. § 77-5-77 . . . . . 5, 21

Utah Code Ann. § 76-10-1210 18

Utah Code Ann. § 76-10-1301 et. seq. 15, 17

ORDINANCES

Rev. Ord. South Salt Lake City, 1974, as amended 3B-8-5(3) 1, 2, 4, 11, 13, 14 19, 20, 21 23, 25, 27 29

Rev. Ord. S.L. County, 1966, as amended 1-10-4 . . . 5

Rev. Ord. S.L. County, 1966, as amended 15-18-5(3) . 11

REFERENCES:

Senate Bill No. 26 (1981) 24

IN THE SUPREME COURT OF THE STATE OF UTAH

CITY OF SOUTH SALT LAKE, A Municipal Corporation, Plaintiff-Respondent, v. DEBBIE L. HANNA, Defendant-Appellant.	:	Case No. 17081

BRIEF OF RESPONDENT

NATURE OF THE CASE

Appellant appeals from a conviction of a violation of § 3B-8-5(3) of the Revised Ordinances of the City of South Salt Lake City (1974 as amended) which ordinance Appellant claims is unconstitutional.

DISPOSITION IN THE LOWER COURT

Appellant was originally prosecuted in South Salt Lake Justice Court and convicted on January 15, 1980. An appeal of the conviction resulted in a second conviction by a jury and a judgment on that conviction by Judge Christine M. Durham.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment of conviction and a determination that the ordinance of the City of South Salt Lake under which Appellant was convicted is unconstitutional.

STATEMENT OF THE FACTS

Respondents agree with Appellant's statement of the facts.

ARGUMENT

POINT I. SECTION 3B-8-5(3) OF THE SOUTH SALT LAKE REVISED ORDINANCES IS A VALID EXERCISE OF POLICE POWER.

A. SOURCES OF THE POLICE POWER.

The Constitution of Utah Article XI Section 5 provides that municipalities shall have:

> . . . the authority to exercise all powers relating to municipal affairs, and to adopt and enforce within its limits local police, sanitary and similar regulations not in conflict with general law, and no enumeration of powers in this Constitution or any law shall be deemed to limit or restrict the general grant of authority hereby conferred, . . .

The Utah legislature, in pursuance of this Constitutional provision has enacted several statutes evidencing this policy.

Section 10-8-84 Utah Code Ann. (1953) as amended is a general grant of police power to chartered municipalities. It states:

> They [municipalities] may pass all ordinances and rules, and make all regulations, not repugnant to law, necessary for carrying into effect or discharging all powers and duties conferred by this charter, and such as are necessary and proper to provide for the safety and preserve the health, and promote the prosperity, improve the morals, peace and good order, comfort and convenience of the city and the inhabitants thereof, and for the protection of property therein; and may enforce obedience to such ordinances with such fines or penalties as they may deem proper; provided that the punishment of any offense shall be by fine

> in any sum less than $300.00 or by imprisonment not to exceed 6 months, or by both such fine and imprisonment. (Emphasis supplied.)

Two additional statutes give cities further powers in dealing with some particular areas of concern within the ambit of the general welfare clause.

Section 10-8-51 grants power to punish certain undesirables as follows:

> They may provide for the punishment of tramps, street beggars, prostitutes, habitual disturbers of the peace, pickpockets, gamblers and thieves, or persons who practice any game, trick or device with intent to swindle.

Section 10-8-41 authorizes cities to:

> Suppress and prohibit the keeping of disorderly houses, houses of ill fame or assignation, or houses kept by, maintained for, or resorted to or used by, one or more persons for acts of perversion, lewdness or prostitution within the limits of the city and within three miles of the outer boundaries thereof, and may prohibit resorting thereto for any of the purposes aforesaid; they may also make it unlawful for any person to commit or offer or agree to commit an act of sexual intercourse for hire, lewdness or moral perversion within the city, or for any person to secure, induce, procure, offer or transport to any place within the city any person for the purpose of committing an act of sexual intercourse for hire, lewdness or moral perversion, or for any person to receive or direct or offer or agree to receive or direct any person into any place or building within the city for the purpose of committing an act of sexual intercourse for hire, lewdness or moral perversion, or for any person to aid, abet or participate in the commission of any of the foregoing; and they may also suppress and prohibit gambling houses and gambling, lotteries and all fraudulent devices and practices, and all kinds of gaming, playing

> at dice or cards, and other games of chance, and the sale, distribution or exhibition of obscene or lewd publications, prints, pictures or illustrations.

The legislative grants of power, as well as the constitutional provision(s), are all made in broad terms, leaving the many substantive requirements and definitions to the respective entities for their drafting and elaboration. Clearly, it is the prerogative and duty of the municipalities to legislate, and thereby implement these delegated powers.

B. THE GENERAL WELFARE CLAUSE SHOULD BE BROADLY CONSTRUED TO ACCORD MUNICIPALITIES WIDE DISCRETION IN EXERCISING POLICE POWER.

The major issue in the present action is whether the City of South Salt Lake had the authority under 10-8-84 Utah Code Ann. (1953) as amended, to enact ordinance 3B-8-5(3). Under a broad interpretation of the general welfare clause, the ordinance would be a valid exercise of that authority.

The case law of this state has presented conflicting views. The rule requiring strict construction of delegated powers, often called the Dillon Rule, may be found in some cases in this state. See, e.g., American Fork City v. Robinson, 77 Utah 168, 292 P. 249 (1930); Salt Lake City v. Sutter, 61 Utah 533, 216 P. 234 (1923); Utah Transit Co. v. Ogden City, 89 Utah 546, 58 P.2d 1 (1936); Nance v. Mayflower Tavern, 106 Utah 517, 150 P.2d 773 (1944); Layton City v. Speth, 578 P.2d 828 (Utah 1978).

But this court has on many occasions given broad interpretations to both specific grants of authority and the general welfare clause. See, e.g., Salt Lake City v. Doran, 42 Utah 401, 131 P. 636 (1913); Salt Lake City v. Howe, 37 Utah 170, 106 P. 705 (1910); Salt Lake City v. Allred, 20 Utah 2d 298, 437 P.2d 434 (1968); Rupp v. Grantsville City, 610 P.2d 33 (Utah 1980); Layton City v. Glines, 616 P.2d 588 (Utah 1980).

This court was recently faced with an identical issue in the case of State v. Hutchinson, ____ P.2d ____ (Utah 1980) No. 16087. There, the court phrased the issue as ". . . whether § 17-5-77 by itself provides Salt Lake County legal authority to enact the ordinance or whether there must be a specific grant of authority for counties to enact measures dealing with disclosures of campaign financing to sustain the ordinance in question." (§ 17-5-77 is the statutory grant of general welfare power to counties, substantially identical to § 10-8-84.).

The defendant Hutchinson was charged with violation of § 1-10-4 Revised Ordinance of Salt Lake County, which requires filing of campaign statements with the county disclosing campaign contributions. The city court dismissed the complaint on the ground that the ordinance was in violation of the Utah Constitution. The district court affirmed the dismissal, applying the strict construction standard, and thus, found that there was no express authority in state statutes authorizing § 1-10-4, nor could the authority be implied from any express power.

On appeal to this court, Hutchinson argued that absent a specific grant of authority to enact the ordinance, the general welfare clause could not be construed expansive enough to confer power to enact the ordinance. This argument obviously advocated the restrictive Dillon rule of construction for general grants of authority. The court, however, expressly rejected the appellant's argument as well as the Dillon rule. The court then set up a definite standard for braod construction of general welfare clauses and also specific grants of authority.

In rejecting the rule of strict construction, the court employed cogent language:

> The rule requiring strict construction of the powers delegated by the legislature to counties and municipalities is a rule which is archaic, unrealistic, and unresponsive to the current needs of both state and local governments and effectively nullifies a legislature's grant of general police power to the counties.
>
> * * *
>
> Strict construction, particularly in the face of a general welfare grant of power to local governments simply eviscerates the plain language of the statute, nullifies the intent of the Legislature, and seriously cripples effective local government.

The court then proceeded to consider the case law in Utah and outlined the importance of broad interpretations of police power. It also reviewed decisions of courts in other states agreeing with the position that a general welfare clause confers power in addition to and beyond that granted by specific

statutory grants. See State v. Hutchinson, ___ P.2d ___ (Utah 1980), at 13-14 and included citations.

The court then conclusively rejected the strict construction, stating at page 17:

> Broad construction of the powers of counties and cities is consistent with the current needs of local governments. The Dillon Rule of strict construction is antithetical to effective and efficient local and state government. If at one time it served a valid purpose, it does so no longer. The complexities confronting local governments, and the degree to which the nature of those problems varies from county to county and city to city, has changed since the Dillon Rule was formulated. Several counties in this state, for example, currently confront large and serious problems caused by accelerated urban growth. The same problems, however, are not so acute in many other counties. Some counties are experiencing, and others may soon be experiencing, explosive economic growth as the result of the development of natural resources. The problems that must be solved by these counties are to some extent unique to them. According a plain meaning to the legislative grant of general welfare power to local governmental units allows each local government to be responsive to the particular problems facing it.
>
> Local power should not be paralyzed and critical problems should not remain unsolved while officials await a biennial session of the Legislature in the hope of obtaining passage of a special grant of authority. Furthermore, passage of legislation needed or appropriate for some counties may fail because of the press of other legislative business or the disinterest of legislators from other parts of the State whose constituencies experience other, and to them more pressing, problems. In granting cities and counties the power to enact ordinances to further the general welfare, the Legislature no doubt took such political realities into consideration. (Emphasis supplied.)

The recent case of Redwood Gym v. Salt Lake County Commission, ___ P.2d ___ (No. 16833 Filed January 19, 1981), dealt with the constitutionality of the "massage parlor" ordinance of Salt Lake County. The massage parlor ordinance of the City of South Salt Lake is virtually identical to the one in Salt Lake County. The court upheld the constitutionality of the ordinance in all respects. In dealing with the police power of the county the court stated at page 5-6:

> It is not the function of this Court to evaluate the wisdom or practical necessity of legislative enactments. The form of the challenged provision, when read in conjunction with the minutes of the public meeting held prior to its enactment, clearly evidenced a concern on the part of the Commission that the state statutory framework, unsupplemented by local ordinances, presented insurmountable enforcement problems in the case of massage parlors. We will not presume to second-guess the soundness of that decision.
>
> In the instant case, the County has been given express power to make rules and regulations, not repugnant to law, necessary and proper to improve the morals, preserve the health, peace and good order among its citizenry. The practice of prostitution within the County has presented a clear threat to the attainment of those goals, and its prevention in the seclusion of a seemingly legitimate massage parlor has proven sufficiently difficult that an ordinance of the sort here in question must be regarded as having been enacted pursuant to power fairly implied from the express provision of state law.

Obviously, the public policy of Utah is to afford municipal authorities wide discretion in the reasonable and nondiscrimin-

atory exercise, in good faith, of the police power in the public interest.

C. THE HUTCHINSON DECISION SET UP A REASONABLENESS AND APPROPRIATENESS STANDARD.

The court clarified Utah law by following the general trend in other jurisdictions, recognizing that a general welfare clause grants power and authority in addition to specific grants of authority. It stated:

> When the State has granted general welfare power to local governments, those governments have independent authority apart from, and in addition to, specific grants of authority to pass ordinances which are reasonably and appropriately related to the objectives of that power, i.e., providing for the public safety, health, morals, and welfare. Hutchinson, supra at page 15.

In further describing the difference and interplay of specific grants of authority and general grants, the court stated at pages 16-17:

> Specific grants of authority may serve to limit the means available under the general welfare clause, for some limitation may be imposed on the exercise of power by directing the use of power in a particular manner. But specific grants should be construed with reasonable latitude in light of the broad language of the general welfare clause which may supplement the power found in a specific delegation.

The court relied upon Salt Lake City v. Allred, supra, in enunciating the standard. In Allred, the defendant was convicted in city court of violation of a municipal ordinance prohibiting "aiding or abetting in the direction of any person

to any place or building for the purpose of committing an act of sexual intercourse for hire." The defendant argued that while statutes specifically empowered the state to prohibit and suppress prostitution, mere aiding and abetting in the direction of a person was not within that specific delegation of authority. Defendant further argued that the general welfare provision should be strictly construed as not enabling the City to make such conduct unlawful.

In upholding the validity of the ordinance under the general police power delegated to cities by § 10-8-84 Utah Code Ann. (1953) as amended, the court stated:

> It is a well-settled rule that it is a proper exercise of the police power . . . to preserve and protect the public morals, and any practice of business which has a tendency to weaken or corrupt the morals of those who follow it, as shown by experience, is such conduct as affects the public morals..
>
> * * *
>
> The protection of public morals has always been a matter of local concern which requires regulation by municipalities, and properly falls within the scope of the police power.

After reviewing the city ordinance and the pertinent state statutes, the court held that:

> . . . both the city ordinance and state statute have the common purpose of defeating the practice of business of prostitution . . . and are closely related in subject matter. The mere fact that an act denounced as a crime under the ordinance which is not denounced as a crime under the statute would not necessarily render the act under the ordinance inconsistent with the statute where as here the ordinance is within the scope of the state law dealing with the same

> related subject of sexual offenses and is in no way repugnant to, but . . . in harmony with the state laws.

At the time of the Allred decision, Utah general law was void of any statute dealing with the aiding and abetting of the public evil of prostitution. However, it is interesting to note that five years later the Legislature recognized the necessity of such a law and enacted a statute very similar to the ordinance upheld in Allred. This seems to lend credence to the language (quoted above) of Hutchinson that local power should not be paralyzed and critical problems should not remain unsolved while officials await a biennial session of the Legislature.

The appellant here contends that 3B-8-5(3) creates a new crime. The same contention was advanced in Allred. Hence, under Allred the test must be whether state law and 3B-8-5(3) have a common purpose of defeating sexual offenses and are closely related in subject matter.

The South Salt Lake city ordinance is substantially the same as § 15-18-5(3) Revised Ordinance of Salt Lake County (1966) as amended. The overriding concern of these ordinances is to prevent the licentiousness that breeds in massage parlors. The act of fondling or touching of the genitalia of massage customers is clearly offensive to the public morals and a conducive environment for the flourishing of prostitution. It is a local concern within the authority of Salt Lake to proscribe.

Touching or offering to touch the genitalia of a patron is a related subject matter to prostitution, if not an aid to the proliferation of prostitution. The City of South Salt Lake and Salt Lake County obviously feel that in order to eliminate the evil of prostitution and sexual offenses, it is necessary to proscribe indecent touching which often is associated with massages. This would definitely fall within the common purpose of State law in defeating the practice of prostitution.

In Allred, the ordinance upheld proscribed the mere directing of a person to a place or building for purpose of prostitution. It was, as the Court felt, a minor extension of the common purpose and a related subject matter. The ordinance at issue here is also a minor extension of the common purpose and of a related subject matter.

The ordinance in question, then, is reasonably and appropriately related to the objectives of the police power, i.e., provide for the safety and preserve the health, promote prosperity, and improve the morals of the community.

In Salt Lake City v. Kusse, 97 Utah 113, 93 P.2d 671 (1938), this court upheld an ordinance which prohibited driving while under the influence of intoxicating liquor. Two statutory grants of power were cited by the City in support of the ordinance; one specific, i.e., power to regulate movement of traffic, the other general, i.e., the police power. The court, not wishing to construe the specific statute, held that the

predecessor to § 10-8-84 was adequate authority to support the ordinance.

The Hutchinson case was a culmination of several recent decisions upholding a broad interpretation of the general welfare powers. In Peck v. Dunn, 574 P.2d 367 (Utah 1978), this court upheld the power of Salt Lake City to pass an ordinance preventing cruelty to animals by proscribing cock fighting. The court concluded that cock fighting was ". . . discordant to man's better instincts and so offensive to his finer sensibilities that it is demeaning to morals" and hence, within the prerogative and responsibility of the city to enact laws to protect, promote, and preserve the health, safety, morals and general welfare of society. If cock fighting is offensive to public morals, then clearly the conduct proscribed by 3B-8-5(3) qualifies for such a classification.

In Call v. City of West Jordan, 606 P.2d 217 (Utah 1979), this court decided that the City of West Jordan had the power to require subdividers to dedicate seven percent of the land area of a prospective subdivision to the public use of the citizens of the City of West Jordan, or in the alternative, the equivalent value of land in cash. The ordinance was sustained under § 10-8-84, the grant of general welfare power, as well as other provision dealing generally with planning and zoning.

Layton City v. Glines, 616 P.2d 588 (Utah 1980), like Kusse, supra, dealt with minicipal authority under § 10-8-84 to enact an ordinance dealing with driving under the influence of

alcohol. Again, absent specific statutory authorization, the ordinance was upheld under the broad police powers delegated to cities. Rupp v. Grantsville City, 610 P.2d 338 (Utah 1980), is further authority for broad construction of the general welfare power.

This court has also held that reasonable latitude of judgment and discretion is essential for local governments to exercise its express and implied powers.

Call v. City of West Jordan, supra, recognized this principle, concluding that it is impractical for statutes to spell out to the last detail all of the things city government must do to perform the functions imposed upon them by law. "The courts will not interfere with the legislative choice of the means selected unless it is arbitrary, or is directly prohibited by, or inconsistent with the policy of the state or federal laws or the constitution of this State or of the United States." State v. Hutchinson, supra, at 16.

Hence, even under the express grant to prohibit and suppress prostitution, the ordinance may be declared constitutional. In order to perform the function imposed upon it, the City of South Salt Lake has selected § 3B-8-5(3) as one part of its scheme in achieving that objective. The ordinance is not arbitrary nor prohibited by general law. It is not repugnant to either the Utah constitution or the United States constitution, but, rather, is in harmony with them.

The ordinance of South Salt Lake is in furtherance of the stated policy of Utah to defeat prostitution and sexual offenses, and is not prohibited by state statute. It is reasonable and appropriate to prevent illicit sexual conduct. The general welfare clause is sufficient authorization for the ordinance.

D. STATE LAW HAS NOT PRE-EMPTED THE FIELD OF SEXUAL OFFENSES.

The appellant contends that the public policy regarding illegal sexual activity is clearly set forth by State statute, §§ 76-10-1301 et. seq. Utah Code Ann. (1953) as amended. The heart of the argument is that the State law is conclusive in the area and any additional law, whether related or not, must be inconsistent.

This court has, on several occasions, rejected this preemption argument. In Salt Lake City v. Kusse, supra, it was held that a local municipal ordinance is not in conflict with a similar state criminal statute unless (1) the local ordinance permits activities prohibited by the state law, or (2) the local ordinance is inconsistent with the state law. The court stated at 673:

> The city does not attempt to authorize by this ordinance what the Legislature has expressly forbidden; nor does it forbid what the Legislature has expressly licensed, authorized or required.
>
> * * *
>
> Unless legislative provisions are contradictory in the sense they cannot coexist, they

> are not to be deemed inconsistent because of the mere lack of uniformity and detail.

Then in Salt Lake City v. Allred, supra, the court was faced with the preemption issue in the context of sexual offenses, as in the present case. The court concluded that the state had not preempted the field of sexual offenses, stating in part at page 436:

> There is nothing in the state statutes regulating sexual offenses that evidences any express or implied intent to preclude local governments from also attempting to prohibit and suppress the difficult problem of the sex offender. Therefore, it is our opinion that the city is not precluded in enacting the ordinance in question unless it is inconsistent or in conflict with the state statutes dealing with sex offenses.
>
> It is a well-established principle in this state that the city has the right to legislate on the same subject as the state statute where either the general police power or express granted authority is conferred upon municipalities. (citations omitted)
>
> However, the defendant contends in the case before us that the ordinance in question is inconsistent and in conflict with the state laws and, therefore, invalid on the grounds that the ordinance attempts to make crimes of acts which are not crimes under the state laws. assuming this to be true, a careful examination of the city ordinance (citation omitted) and the material sections of the state laws pertaining to sexual offenses, (citations omitted) reveals that both the city ordinance and the state statutes have the common purpose of defeating the practice of business of prostitution or the vice of sexual intercourse for hire and are closely related in subject matter. The mere fact that an act denounced as a crime under the ordinance which is not denounced as a crime under the statute would not necessarily

> render the act under the ordinance inconsistent with the statute whereas here the ordinance is within the scope of the state law dealing with the same related subject of sexual offenses and is in no way repugnant to, but on the other hand is in harmony with the state laws. We believe the ordinance is consistent with the statute pertaining to sex offenses.

The appellant argues that since state law has preempted the sexual offense field, any attempt to make a crime of something not dealt with directly by § 76-10-1301 Utah Code Ann. (1953) as amended, is not a sexual offense and therefore inconsistent with state law. However, under Allred and Hutchinson, two local governments were empowered, under the general welfare clause, to create new crimes for the protection of public morals, so long as they reasonably related to the purpose of the police power. The appellant's contention is untenable in light of recent decisions.

In Hutchinson, the court also dealt with the preemption issue. In rejecting preemption, it was said at page 18:

> The subject of campaign disclosure requirements is not one that reflects a need for uniformity. With the differences in the nature of the counties in the State of Utah with respect to population, wealth, and other factors . . . , it is reasonable, in the absence of State legislation, that each county should deal with the problem of the integrity of its electoral processes as it deems appropriate. The ordinances in this case do not conflict, directly or impliedly, with any state statute and are not for that reason unconstitutional.

The court in effect took a pragmatic posture of applying the need of "uniformity" test. The clear policy of this state,

regarding sexual offenses and the protection of public morals, is expressly not that of uniformity. Pertinent here is § 76-10-1210 Utah Code Ann. (1953) as amended, which is part of a series of statutes dealing with public nudity and pornography. The section specifically leaves power to the local governments to legislate in this area. Allred is further support for this point, stating that protection of public morals has always been a matter of local concern.

Redwood Gym, supra, also upheld the rationale of Salt Lake City v. Allred that local government may legislate by ordinance in areas previously dealt with by state legislation. A companion case, Larry Hollingsworth v. City of South Salt Lake, ___ P.2d ___ (No. 16831 Filed January 19, 1981), dealt with the specific ordinance in question on this appeal. The court specifically relied upon Salt Lake City v. Allred, supra, in stating at page 2:

> The argument is rebuffed by our holding in the case of Salt Lake City v. Allred. It was therein made clear that no provision of state law, express or implied, forbade cities or other local units of government, pursuant to delegated offenders so long as no actual conflict arose between the two provisions. Such a conflict, moreover, would not be found in the simple fact that the city provision sought to outlaw and penalize actions on which state laws were silent. So long as the provisions were conducive to the same regulatory end, no conflict would be found. (citations omitted)

The appellant's next point to the alleged conflict in penalties between the state statutes dealing with prostitution

and those of 3B-8-5(3) dealing with massage regulation. They cite as authority Layton City v. Speth, 578 P.2d 828 (Utah 1978); and Allgood v. Larsen, 545 P.2d 530 (Utah 1976).

Layton City involved conflict of penalties between the city ordinance and the state statute. The state statute provided that a third or subsequent conviction under the statute constitutes a class A misdemeanor, while the city ordinance only provided for a class B misdemeanor. The city had merely copied the state statute.

In Allgood, the defendant was convicted under the city's trespass ordinance which imposed a jail sentence. The State law of trespass made it an infraction only, and thus, no possible jail sentence. The court held that the ordinance was in direct conflict with general law.

The present case can be distinguished from both decisions. The present ordinance is not a copy of state law, nor is it in direct conflict with a state law. The Allgood court distinguished Kusse, supra, which supports the notion that a city may prohibit additional things where the legislature has not specifically forbidden it.

Salt Lake City v. Allred, supra, states at 436:

> A municipal ordinance is not in conflict with a statute authorizing its adoption because of a difference in penalties. Thus, further and additional penalties may be imposed by statute, without creating inconsistency and conversely, at least in some instances lesser penalties may be imposed by the ordinance for violation than by the statute without conflict.

In Allgood, the ordinance attempted to impose a more stringent penalty and was thus invalid. But the present case is in agreement with the language of Allred.

Further, the precedential value of the language in Allgood and Layton City is diminished by the fact that a majority of the justices did not join in the majority opinion in either case.

Both Kusse and Allred were reaffirmed in Hutchinson, thus demonstrating that the state has not preempted the field of sexual offenses. The South Salt Lake city ordinance does not contradict the general law of the state, but rather, it is in conformity with it.

E. SECTION 3B-8-5(3) DOES NOT VIOLATE ARTICLE I, § 24, OF THE UTAH CONSTITUTION.

Appellant argues that the alleged re-definition of prostitution under 3B-8-5(3) is in direct conflict with state law and deprives state law of its uniform effect as mandated in Article I, § 24 of the Utah Constitution. This argument assumes a strict construction of the general welfare authority delegated to cities.

The same issue was propounded in Hutchinson, supra, and the court held:

> Finally, contrary to defendant's contentions, a grant of general welfare authority to counties does not violate Article I, § 24, or Article XI, § 4 of the Utah Constitution, which requires uniform operation of general laws and a uniform system of county government. The general welfare clause, §

> 17-5-77, applies uniformally to all counties. The fact that each county may make different use of the power granted is of no constitutional moment. Indeed it would be absurd and would make a mockery of the concept of local self-government to require that all counties must have the same ordinances as all others. Generally, as to county ordinances, Article I, § 24 only requires uniformity of laws within the jurisdiction in which they are operative.

Ordinance 3B-8-5(3) has been given uniform application over all of South Salt Lake City. It is therefore not in conflict with Article I, § 4 of the Utah Constitution.

POINT II. SECTION 3B-8-5(3) DOES NOT DENY EQUAL PROTECTION OF THE LAW TO MASSAGISTS BECAUSE IT IS REASONABLY RELATED TO THE LEGITIMATE OBJECTIVE OF SUPPRESSING THE USE OF MASSAGE PARLORS FOR IMMORAL PURPOSES.

An early Utah decision set forth the rule regarding classifications in an equal protection analysis under Utah law. Justice Wolfe defined the test in State v. Mason, 94 Utah 501, 78 P.2d 920 (1938):

> Of course, every legislative act is in one sense discriminatory. The Legislature cannot legislate as to all person or all subject matters. It is inclusive as to some class or group and as to some human relationships, transactions, or functions and exclusive as to the remainder. For that reason, to be unconstitutional the discrimination must be unreasonable or arbitrary. A classification is never unreasonable or arbitrary in its inclusion or exclusion features so long as there is some basis for the differentiation between classes or subject matters included as compared to those excluded from its operation provided the differentiation bears a reasonable relation to the purposes to be accomplished by the act.

In constitutional challenges to opposite-sex massage ordinances, the courts have uniformily rejected the equal protection argument. The arguments there are very similar to appellant's here--that other people are not subject to like restrictions. Patterson v. City of Dallas, 355 S.W.2d 838 (Tex. Cir. app. 1962), appeal dismissed for want of a substantial federal question, 372 U.S. 251, 83 S. Ct. 873, 9 L.Ed.2d 732 (1963), is representative of these cases. The Patterson court stated at 840-41:

> The question is directly presented: Does Section 8-28 of the Code of Civil and Criminal Ordinances of the City of Dallas bear a reasonable and substantial relationship to the ends sought to be achieved by the legislating body, or does same arbitrarily establish a fixed Code of conduct which bears but a remote speculative and conjectual relationship to any valid results sought to be achieved under the Police power:
>
> * * *
>
> From the undisputed testimony of Captain Gannaway, and considering the record as a whole it is apparent that the Police Department of the City of Dallas was confronted with a real problem in the operating of massage establishments because of lewd acts committed or arising from the massaging of a person of one sex by a person of another sex. In an effort to correct this evil the Police Department of the City of Dallas made investigations and collected facts which were presented to the attention of the City Council of the City of Dallas with the recommendation that the Ordinance in question be passed in an attempt to curb the evil which then existed. It is to be observed that the Section under attack prohibits a member of one sex from administering a massage to a person of the opposite sex, with the exception noted. It does not prohibit, but permits, a masseur to administer a massage to a member of the male sex, and a masseuse to administer a massage

> to a member of the female sex. The right to conduct a massage establishment, after complying with the Massage Ordinances and securing a permit, is not prohibited but is merely regulated. This record does not demonstrate failure on the part of the City Council to perform its legal functions. Appellants have failed to sustain their burden of proof to show that the Ordinance complained of was enacted without reason or that it was enacted arbitrarily.

Since § 3B-8-5(3) is a copy of the Salt Lake County ordinance, the minutes of the Board of County Commissioners' meeting of November 20, 1978 are relevant here. Those minutes contain statements of Captain Morgan of the Salt Lake County Sheriff's office and Assistant Salt Lake County Attorney Oberhansy and reflect the serious problems that law enforcement officials were faced with as a result of the lewd and immoral acts arising from the massage parlors. Each official recommended that the ordinance in question be adopted in an effort to curb the problem that then existed in Salt Lake County. See Brief of Respondents, Redwood Gym v. Salt Lake County Commission, No. 16833, Utah Supreme Court (1981) at 24.

Redwood Gym, supra, rejected the equal protection challenge stating at 10-11:

> Where a legislative enactment creates no inherently suspect classification and touches upon no fundamental interest as recognized by the Constitution, it satisfies the exigencies of equal protection if the classification made thereby has a rational basis in a legitimate legislative objective. The opposite-sex massage provision clearly meets such a standard.
>
> * * *
>
> The prevention of acts of prostitution is among the oldest and most venerable func-

> tions of the police power. The difficulty of enforcing such prohibitions in a massage parlor, where all acts of wrongdoing may be confined to a private and isolated location, clearly indicates the sort of blanket prohibition prescribed by the subject enactment. (citations omitted)

The Utah Legislature, during the recent session, enacted the Massage Practice Act. The bill, S.B. No. 26 (1981), as enacted, is a comprehensive licensure measure for the implementation and enforcement of standards for massage technicians and massage establishments. The bill was signed into law by the Governor on February 17, 1981.

After establishing a board of massage, and extensive qualification requirements for a massage license, the bill in Section 19, page 7 states:

> The license of a massage technician or a massage establishment may be revoked, suspended or cancelled upon any one or more of the following grounds:
>
> (1) The licensee is guilty of prostitution . . .

The legislature has recognized the pressing need to control the massage industry. Of the various grounds for revocation of a license, prostitution occupies the prime position. While the particular bill only deals with licensure, it is indicative of the legislative concern for the quality of the massage business.

Similarly, the Supreme Court of North Carolina in Smith v. Keator, 285 N.C. 530, 206 S.E.2d 203 (1974), appeal dismissed for want of a substantial federal question, 419 U.S. 1043, 95

S. Ct. 613, 42 L.Ed.2d 636 (1974), upheld an opposite-sex massage ordinance, stating:

> 'The barrier erected by the ordinance against immoral acts likely to result from too intimate familiarity of the sexes is no more than a reasonable regulation imposed by the city council in the fair exercise of police powers.' (Quoting from Ex parte Maki, 56 Cal. App. 635, at 638, 133 P.2d 64, at 67 (1943).
>
> * * *
>
> There is nothing in the ordinance that denies the equal protection guaranteed by the Fourteenth Amendment. It applies to all alike who give massages for hire.
>
> * * *
>
> Class legislation is not offensive to the constitution when the classification is based on a reasonable distinction and the law is made to apply uniformly to all members of the class affected. Keator, supra, at page 209.

The ordinance in issue applies uniformly to all masseurs and masseuses. It is reasonably related to the legilative purpose and the classification is reasonable in light of the lewd and immoral acts often encountered in massage establishments.

POINT III. SECTION 3B-8-5(3) IS SPECIFIC AND SUSCEPTIBLE TO LOGICAL AND RATIONAL INTERPRETATION AND THEREFORE IS NOT VAGUE.

When a court reviews an ordinance to ascertain its constitutionality, certain rules of construction apply. Those rules are described in Salt Lake City v. Savage, 541 P.2d 1035 (Utah 1975), cert. denied, 425 U.S. 915, 96 S. Ct. 1514, 47 L.Ed.2d 766 (1975), and apply equally to the present examination:

> In reviewing an ordinance or statute to ascertain its constitutionality, certain rules of construction must be applied:
>
> (a) A legislative enactment is presumed to be valid and in conformity with the constitution.
>
> (b) It should not be held to be invalid unless it is shown beyond a reasonable doubt to be incompatible with some particular constitutional provision.
>
> (c) The burden of showing invalidity of an ordinance or statute is upon the one who makes the challenge.

In dealing with the vagueness issue, this court has said:

> In regard to plaintiff's contention, these things are to be said generally about the interpretation and application of a statute or ordinance: it is not our duty to indulge in conjecture that the statute may be so distorted or unreasonably applied that some innocent person might come within its terms. Rather, it is our duty to assume that those who administer a statute will do so with reason and common sense, in accordance with its language and intent; and further, that if there is a choice as to the matter of its interpretation and application, that should be done in a manner which will make it constitutional, as opposed to one which would make it invalid. Peck v. Dunn, supra, at 369.

In State v. Packard, 122 Utah 369, 250 P.2d 561 (1952), it was said:

> It is recognized that statutes should not be declared unconstitutional if there is any reasonable basis upon which they may be sustained as falling within the constitutional framework (citations omitted), and that a statute will not be held void for uncertainty if any sort of sensible, practical effect may be given it. (Citations omitted.)

This court clearly employed the above rule stating in part:

> Concerning the charge that the statute is void for vagueness: the presumption of validity hereinabove stated, gives rise to the rule that a statute will not be declared unconstitutional for that reason if under any sensible interpretation of its language it can be given practical effect. The requirement is that it must be sufficiently clear and definite to inform persons of ordinary intelligence what their conduct must be to conform to its requirements and to advise one accused of violating it what constitutes the offense with which he is charged. Greaves v. State, 528 P.2d 805, 807 (Utah 1974).

The language of § 3B-8-5(3), "It shall be unlawful for a masseur to touch or offer to touch or massage the genitals of customers," is sufficiently clear and definite to inform persons of ordinary intelligence what conduct is proscribed.

Appellant argues that the ordinance does not require intent and therefore allows courts wide latitude in interpretation of the ordinance. The appellant hypothesizes that a masseur could violate the ordinance by the mere innocent act of brushing or bumping the genitals of a customer.

A similar contention was raised in the declaratory judgment action in Peck v. Dunn. There, appellant Peck attempted to have a county ordinance declared unconstitutional on two grounds. The first ground was that it was vague and uncertain in that innocent conduct of merely being a spectator (to a cock fight) could be included within its language, and secondly, that presence at such a cock fight is proscribed, without requiring a culpable mental state.

After upholding the ordinance as ". . . justified for the purpose of regulating morals and promoting the good order and general welfare of society," the court held in regard to the intent issue that:

> [After discussing crimes regarding specific intent] . . . there is another class of crimes in which the doing of the act itself constitutes the crime, without regard to the intent with which it is done. They are spoken of as malum prohibitum, and are sometimes referred to as crimes of strict liability, or absolute responsibility. . . . With respect to this class of crimes, the only criminal intent necessary is implicit in the willful doing of the prohibited act.
>
> Applying the principles above stated to the plaintiff's contentions, it will be seen that a sensible and practical application of the ordinance would require a person to be present as a spectator in the sense of one purposefully and intentionally attending and observing such a fight, as opposed to some mere passerby happening to so observe it.

Hollingsworth v. City of South Salt Lake, supra, held that this specific statute was not vague:

> Plaintiffs contend, finally, that the provision here under consideration is void due to vagueness, in that it fails, by its terms, to define precisely what is forbidden, and what allowed. We cannot agree that any person of reasonable intelligence would be left in doubt regarding the nature of the act forbidden by the ordinance; the act of touching or massaging the genitals of a massage parlor patron, or of making an offer to do so, is hardly susceptible of more exact definition. at 3.

The ordinance of South Salt Lake City need not specifically require intent, because a sensible and practical application of it would require that any offer to, or actual touching or

massage, be done with purposeful and intentional conduct. We must assume that the judicial authorities entrusted with the interpretation of this ordinance will employ common sense and general understanding of human nature in deciding actions before them.

CONCLUSION

The exercise of the delegated police power by the City of South Salt Lake in enacting ordinance 3B-8-5(3) was valid. The recent decisions of this court have sustained this broad authority. Similarly, the State has not preempted the field of sexual offenses, thus allowing municipalities to legislate in the same area.

The ordinance does not violate the Equal Protection clause of the Fourteenth Amendment to the United States Constitution, because it applies equally to all parties within a reasonable classification.

Finally, the ordinance is not vague and is susceptible to reasonable and rational interpretation.

The decision of the Third Judicial Court of Utah should be affirmed.

Respectfully Submitted this _____ day of January, 1981.

Clinton Balmforth
Attorney for Plaintiff-Respondent